No. 2044.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

APPELLANT,

vs.

TSUJI SUEKICHI,

APPELLEE.

In the Matter of the Application of Tsuji Suekichi
For a Writ of Habeas Corpus.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF HAWAII.

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STATEMENT OF THE CASE.

The facts herein involved are comparatively few and simple. The District Court of Hawaii evidently determined the case upon the pleadings, and from the pleadings themselves we may fairly gather the facts. They are as follows:

Tsuji Suekichi, a subject of the Empire of Japan, arrived in the United States at the port of Honolulu, on July 27, 1906, and was duly admitted as an alien immigrant.

On September 26, 1910, he left the port of Honolulu for the Empire of Japan, intending, according to his own statement, to return to Honolulu. He arrived at Honolulu again on June 17, 1911, and upon a hearing before a Board of Special Inquiry, duly and regularly convened, was denied admission, and ordered deported. He waived his right of appeal in writing, and instituted *habeas corpus* proceedings. While in the United States, and in the year 1909, he was indicted and convicted of a violation of the provisions of Section 3 of the Act of February 20, 1907, the charge being that he did keep, maintain, control, support and harbor, for the purpose of prostitution, a woman named Masuyo Tsuji, that woman being his wife, and the woman with whom he came to the Territory, and whom he was returning to join. The record appears to be silent, save by inference, as to the occupation of the woman at the time the petitioner for the writ returned to Honolulu. She was practicing prostitution when he left, and further than that the record is silent. Tsuji Suekichi was rejected on the ground that he had been convicted of a crime involving moral turpitude.

ARGUMENT AND BRIEF.

The legal questions involved are few and definite. Taking them up in their natural order, we shall first consider the one relating to the jurisdiction of the court.

The decision of the Board of Special Inquiry, affirmed on appeal, or not appealed from, is, according to the terms of the immigration laws, final. As to this provision, however, and particularly as to its applicability to cases where the alien affected is a returning alien, some very considerable difference exists in the several decisions of the courts. The trend of recent authority seems to be in the direction of upholding the jurisdiction of the court, although there are some very well considered cases to the contrary.

So far as this court is concerned, the matter seems to us to have been definitely settled by the decision in the *Nakashima Case,* 160 Federal, 842. In that case a returning immigrant, suffering with trachoma, was denied admission, but that denial was held to be wrong by this court. It is true that in its opinion the court, in discussing the finality of the decision of the Board of Special Inquiry, held that one question involved in the decision was as to the residence and intention of the alien. The court said:

> "While the statute declares that the decisions of the Board shall be final, it allows an appeal and provides that the decision on appeal shall be final. In the present case the dismissal of the appeal was a denial of the right of appeal to the appellee herein. That right having been denied, we find in the record no final decision. If the Secretary of Commerce had entertained the appeal, and had affirmed the decision of the Board, a different question would be presented."

Nevertheless, some of the authorities relied upon for sustaining the proposition that the Immigration Act did

not cover returning aliens, clearly uphold the jurisdiction of the court.

In *In re Buchsbaum,* 141 Federal, 221, the allegation of the petitioner that he was not given a lawful opportunity to appeal, appears to have been swept aside by District Judge McPherson as wholly immaterial. In the earlier cases cited the jurisdiction of the court was upheld without any reference to a denial of the right to appeal. Indeed, in the *Nakashima Case* itself the record will show in the lower court that the question of the denial of the right of appeal was not considered as affecting the case. For these reasons, therefore, we are inclined to believe that the *Nakashima Case* was decisive on the question of jurisdiction.

Assuming, however, that it was not intended to be decisive, then the question would be simply as to whether or not the appellee in this case had been accorded a reasonable hearing on the question of his right to land in the United States. So far as the record in this respect is concerned, it is clear that such a hearing was accorded Tsuji Suekichi, and that he was notified of his right of appeal, and waived that right.

Under these conditions, a review of the law on the subject of jurisdiction may perhaps become necessary, and we shall refer briefly to some of the cases on the subject.

In re Martorelli, 63 Federal, 437, Circuit Judge Lacombe held that the Immigration Act of 1891 did not refer to returning aliens. Jurisdiction was entertained without comment, the only authority referred to is the *Panzara*

Case, 51 Federal, 275. In the *Panzara Case* District Judge Benedict entertained jurisdiction and discharged an alien held for deportation. In the opinion it is said that the case was one outside of the jurisdiction of the superintendent of immigration, and that he had no authority whatever to act.

In re Maiola, 67 Federal, 114, was a case in which Judge Lacombe again held that a returning immigrant was not within the laws then in existence. In this case, however, he went more fully into the question of jurisdiction, and held that the courts might exercise jurisdiction on *habeas corpus,* notwithstanding the fact that the immigration law made the decision of the executive officers final. This case, as well as the two preceding ones, was of course decided under the immigration law of 1891.

In the case *In re Monaco,* 86 Federal, 117, Judge Lacombe appeared to be somewhat in doubt as to what should be done. It was a case where returning immigrants had been ordered deported because the physician reported them to be suffering from a loathsome, contagious disease. It seems that later the physician modified his diagnosis. The opinion concludes as follows:

> "Under these circumstances, the decision of the board cannot be accepted as final, and the case is sent to the clerk of the court, to take testimony and report the facts bearing on the questions: (1) Whether petitioners are immigrants; (2) whether they, or any of them, are suffering from a loathsome, contagious disease."

In re Ota, 96 Federal, 487, arose in the District Court, N. D. California, and was decided by Judge De Haven.

It was likewise a case of a returning alien suffering from a loathsome, contagious disease. Dealing with the question of jurisdiction, Judge De Haven held that the decision was final and that the courts could not interfere. The opinion does not deal with the question of appeal. Perhaps this was because of the fact that the Act of 1891 did not, as does the Act of 1907, provide that there shall be no appeal where rejection is ordered on account of aliens suffering from a loathsome or contagious disease.

In re Di Simone, 108 Federal, 942, decided March 2, 1901, by Judge Boarman, of the Eastern District of Louisiana, is more entertaining and exhaustive than instructive.

One is not surprised at the footnote to the case, which reads: "Reversed on confession of error."

Moffitt vs. *United States,* 128 Federal, 375, was decided by this court. It was a criminal case against the master of a steamship, based upon a violation of the immigration Act of 1891. The case is interesting only from the fact that who is an alien immigrant is defined. It more nearly corresponds with the *Taylor Case* in the Supreme Court of the United States, than with the case at bar.

In re Kleibs, 128 Federal, 656, is a case which is difficult to understand, in view of the former rulings made by Circuit Judge Lacombe. It was the case of a returning immigrant who, when he left the United States, had bought a farm and taken out his first papers. Perhaps there was nothing in the record to show that when he left the United States he had any intention of returning.

In re Buchsbaum, 141 Federal, 221, decided in 1905. This case arose under the Immigration Act of 1903. The immigrant was rejected on the ground that he was afflicted with trachoma. In his petition for the writ of *habeas corpus* he set forth, amongst other things, that he was not given a lawful opportunity to appeal by the Commissioner of Immigration. He was ordered discharged without any reference whatever to the fact that he alleged he had been deprived of his right to appeal. The *Panzara, Martorelli* and *Maiola* cases are given as authority for the action of the court. The question of jurisdiction is not discussed, nor is any reference made as to the finality of the decision of the executive officers. The Act of 1903, like the Act of 1907, provides that the decision of the Board of Special Inquiry, based upon the certificate of the examining medical officer, shall be final. (See Sec. 10, Immigration Act of March 3, 1903; 32 Stats. at Large, Part I, page 1216.)

United States vs. *Aultman Co.,* 143 Federal, 922, is an interesting case. District Judge Taylor of the Northern District of Ohio, reviews the various immigration laws at length. It was a suit brought under the Act of 1903, against a concern for importing contract laborers. The laborer had gone into Canada for two weeks from the United States, and returned under contract. The Judge, in directing a verdict in favor of the defendant, held that within the meaning of the Act of 1903, the alien was not an alien immigrant.

The case of *Rodgers* vs. *United States,* reported in 152 Federal, 346, arose on an appeal by the government in

the *Buchsbaum Case,* and was decided by the Circuit Court of Appeals of the Third Circuit. Again was it held that the court might entertain jurisdiction in the event of denial upon appeal, and again was it held that a returning alien was not an alien immigrant within the meaning of the Act of 1903. The various authorities are quite fully reviewed.

Taylor vs. *United States,* reported in 152 Federal, 1, decided by the Circuit Court of Appeals of the Second Circuit, just about a month prior to the *Rodgers* decision, held that a returning alien was an alien immigrant. The opinion contains an exhaustive review of the act itself, and of the Congressional debates attendant upon its passage. The case is important, since an appeal was taken to the Supreme Court of the United States. While the decision was reversed, it was on a point other than the construction of the word "alien."

Taylor vs. *United States,* 207 U. S., 130. This was an appeal to the Supreme Court of the United States in the last mentioned case. On the ground that a deserting sailor is not an alien within the meaning of the Immigration Act of 1903, the lower court was reversed. Touching the construction placed by the lower court on the Act, the Supreme Court says:

> "A reason for the construction adopted below was found in the omission of the word 'immigrant' which had followed 'alien' in the earlier acts. *No doubt that may have been intended to widen the reach of the statute,* but we see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the act who did not come

> here with intent to remain. It is not necessary to regard the change as a mere abbreviation, although the title of the statute is 'An Act to Regulate the Immigration of Aliens into the United States.' ''

In the very well considered case of *Ex parte Peterson,* 166 Federal, 538, District Judge Purdy treats the language of the Supreme Court in the *Taylor* case as being "especially" significant. He also deals with the *Nakashima Case,* and the various other authorities.

In *United States* vs. *Watchorn,* 164 Federal, 152, Circuit Judge Ward of the Southern District of New York refused to take jurisdiction in the case of a returning alien under the Act of 1907. He mentions the *Nakashima* case, and says that if an appeal had been allowed, and the Secretary had affirmed the action of the Board, the Court would have considered such decision as final. He refused to take jurisdiction, holding the decision of the immigration authorities to be final.

In *Ex parte Crawford,* 165 Federal, 832, District Judge Adams followed the ruling of Circuit Judge Ward in the case last cited.

In *Sprung* vs. *Morton,* 182 Federal, 330, District Judge Waddill of the Eastern District of Virginia, held that where an alien has once lawfully entered the United States, the re-entry after a temporary absence does not make her subject to deportation. In arriving at the conclusion, the learned judge relied on the various cases cited above, and on the reasoning therein employed. This case was decided on December 31, 1909. The decision was reversed later.

United States vs. *Sprung,* 187 Federal, 903, this being an appeal from the case last referred to, was decided by the Circuit Court of Appeals of the Fourth Circuit. It followed the rulings of the Circuit Court of Appeals of the Second Circuit, and reversed the lower court.

In *Ex parte Hoffman,* 179 Federal, 840, the Circuit Court of Appeals again held that the word "alien" was broader than the words "alien immigrant."

The latest decision on the subject which can be found by us, has apparently not yet been reported. It is the case of *Percy L. Prentis, Immigrant Inspector,* vs. *Petros Stathakos,* and was an appeal by the government from the holding of the District Court of the United States for the Northern District of Illinois, to the Circuit Court of Appeals for that Circuit. The immigrant had lived in the United States for ten or fifteen years, and acquired property. He returned temporarily to Greece. When he came back it had been discovered that prior to his first coming to the United States he had been guilty of a crime in Greece. The Court in conclusion said:

> "Unfortunately for him, he returned to Greece, and thereby, by coming back, laid the foundation for his deportation, notwithstanding his long residence and good record. These circumstances undoubtedly lay the foundation for the exercise of a broader discretion in cases like this than the mere plain enforcement of the act. But whatever discretion shall be exercised is for the Secretary of Commerce and Labor, and not for the courts."

From the above review of the authorities it will be seen that at least three Circuit Courts of Appeal hold

that a returning alien is within the purview of the immigration statutes now in force, and that even though a hearing be denied him, yet on *habeas corpus,* if it appear that he is disqualified from entry, the writ will be dismissed. The Circuit Courts of Appeal of two other Circuits appear to hold the contrary. The Supreme Court of the United States by its language appears to hold the views of the three circuits.

Independent of questions of jurisdiction, and ordinary questions of returning immigrants, the government in this particular case contends that SUEKICHI is not entitled to land in the United States. As has been stated above, no question of the fairness of his hearing is involved, since he waived that right. (See record, p. 17.)

The record clearly shows that SUEKICHI was convicted of the crime of harboring an alien woman for immoral purposes. (See record, pp. 15-16-20.)

By reason of the decision of the Supreme Court of the United States in the *Keller Case* (213 U. S., 138), certain amendments became necessary to the Immigration Act in so far as it dealt with the question of prostitutes and importers of alien women. In making the necessary amendments Congress in 1910 passed quite a comprehensive Act. (36 Stats. at Large, Part I, p. 263.)

As amended Section 2 of the Immigration Act excluded persons supported by or receiving in whole or in part the proceeds of prostitution; and persons procuring or attempting to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral pur-

pose. Section 3 was amended in such a manner as to provide that any alien who might receive, share in, or derive benefit from any part of the earnings of any prostitute; or who might be employed by, in, or in connection with any house of prostitution, or music or dance hall, or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who might in any way assist, protect, or promise to protect from arrest any prostitute, should be deported in a given manner. The amendment further provides that any attempt on the part of any alien debarred or deported in pursuance of the provisions of the section, to return to the United States, should be deemed guilty of a misdemeanor, and upon conviction under any of the provisions of the section, the alien should, upon the expiration of the sentence, be deported to the country whence he came.

It follows from these amendments that at the time of the arrival of SUEKICHI in the United States, the law provided that an alien who had been debarred or deported because he received, shared in, or derived benefit from any part of the earnings of any prostitute; or because he was employed by or in connection with any house of prostitution, or music or dance hall, or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gathered; or because he had in any way assisted, protected, or promised to protect from arrest any prostitute, could not be permitted to land. The law as amended also punished an alien for an attempt to return to the United States, if he had before been debarred or deported for the above reasons.

SUEKICHI went back to Japan in September, 1910, (record, p. 14) subsequent to the passage of this amendatory Act. He had been released from jail seven months at that time (record, p. 16). After his release from jail he cohabited with his wife (record, p. 16). At the time of his return to Japan she was practicing prostitution (record, p. 16).

It, therefore, follows that at the time SUEKICHI went to Japan voluntarily, he was in fact subject to deportation under the terms of the Act, since he was clearly countenancing the practice of prostitution by his wife, and necessarily must have been frequenting places where prostitutes gathered. The provisions of the Act of March 26, 1910, have been held to cover the cases of aliens who were in the United States at the time of its passage, and indeed, to cover the cases of aliens in the United States without respect to the time of their arrival in the United States.

U. S. vs. *Weis,* 181 Fed., 860;
U. S. vs. *Williams,* 183 Fed., 904;
U. S. vs. *S. S. Co.,* 185 Fed., 158;
Sire vs. *Berkeshire,* 185 Fed., 971.

Had SUEKICHI been deported under a warrant of the Secretary of Commerce and Labor, as he might have been under the law of 1910, not only could he not have returned to the United States when he did, but had he attempted to do so, could have been imprisoned for two years, and would then have been deported.

Inasmuch as Congress by the Act of 1910 provided that resident aliens practicing the things of which SUEKICHI

had been found guilty, were subject to the provisions of the law, it is respectfully submitted that an intention on the part of Congress to apply those parts of the law dealing with procurers, prostitutes, etc., to returning aliens as well as to aliens coming here for the first time, clearly appears.

It is true, indeed, that the Board of Special Inquiry rejected SUEKICHI on the ground that he had been convicted of a crime involving moral turpitude, and apparently not because at the time he left for Japan he was engaged in practices which would have authorized his deportation. However, the inquiries made of the immigrant, and particularly those relative to his actions after the conclusion of his sentence and before his departure, show that the Board was endeavoring to ascertain whether SUEKICHI was amongst the excluded classes, and that their refusal to permit him to land was based on the broad proposition that he had been and was at the time of his departure a procurer, and that his conviction had not reformed him.

Counsel for the government is not unmindful of the fact that the Supreme Court of the United States, in the *Keller* case, held that the statute under which SUEKICHI was convicted was unconstitutional. It will be noted, however, that the *Keller* case dealt with the unconstitutionality of the law within one of the states, and not within a territory. The decision turned upon the single question of whether Congress had "power to punish the offense charged, or is jurisdiction thereof solely with the state?" Not one word of the reasoning would apply were

the question to arise within the Territory of Hawaii. Over the Territory Congress has supreme power. It is not a question of conflicting jurisdiction, since Congress has absolute and unqualified powers, subject of course to the Constitution, within the Territory.

Even were it to be held that the *Keller* case did not apply to a territory, yet again does the fact remain that the decision of the Board of Special Inquiry was based to some extent on the actions of SUEKICHI subsequent to the expiration of his sentence. Indeed, according to SUEKICHI, he believed his wife was still practicing prostitution (record, p. 16), since he said, "I am going to put a stop to that business."

For the reasons above, it is respectfully submitted that the judgment of the District Court of Hawaii should be reversed, and the writ of *habeas corpus* ordered dismissed.

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